

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE EASTERN DISTRICT OF TEXAS  
3                   MARSHALL DIVISION

4   MARK T. EDDINGSTON,           ) (  
5   ET AL.                        ) (   CIVIL DOCKET NO.  
6                                   ) (   2:12-CV-422-JRG-RSP  
7   VS.                            ) (   MARSHALL, TEXAS  
8                                   ) (  
9   UBS FINANCIAL                 ) (   FEBRUARY 4, 2013  
10  SERVICES, INC.                ) (   1:30 P.M.

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13  BILL HENDRICKS, ET AL.       ) (  
14                                   ) (   CIVIL DOCKET NO.  
15                                   ) (   2:12-CV-606-JRG-RSP  
16  VS.                            ) (   MARSHALL, TEXAS  
17                                   ) (  
18  UBS FINANCIAL                 ) (   FEBRUARY 4, 2013  
19  SERVICES, INC.                ) (   1:30 P.M.

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21                   MOTION HEARING  
22                   BEFORE THE HONORABLE JUDGE ROY S. PAYNE  
23                   UNITED STATES MAGISTRATE JUDGE

24

25



1 APPEARANCES:

2

3 FOR THE PLAINTIFFS: (See attached sign-in sheet.)

4

5 FOR THE DEFENDANT: (See attached sign-in sheet.)

6

7 COURT REPORTER: MS. SHELLY HOLMES, CSR  
Deputy Official Court Reporter  
8 2593 Myrtle Road  
Diana, Texas 75640  
9 (903) 663-5082

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11 (Proceedings recorded by mechanical stenography,  
transcript produced on a CAT system.)

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I N D E X

February 4, 2013

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Appearances

1

Hearing

4

Court Reporter's Certificate

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1 LAW CLERK: All rise.

2 THE COURT: Good afternoon. Please be  
3 seated.

4 For the record, we're here for the hearing  
5 on the motion to compel arbitration and the scheduling  
6 conference in the -- two cases of Eddington versus UBS  
7 and Hendricks versus UBS, which are 2:12-422 and  
8 2:12-606, respectively.

9 Would counsel state their appearances for  
10 the record?

11 MR. BAXTER: Good afternoon, Your Honor.  
12 Sam Baxter with McKool Smith for the Plaintiff. And  
13 with me today I have Mr. Goodman from Kilgore & Kilgore,  
14 Mr. Stris from California, Mr. Bro from California, and  
15 Mr. Anderson from Dallas at Kilgore & Kilgore, Your  
16 Honor, and we're ready.

17 THE COURT: All right. Thank you,  
18 Mr. Baxter.

19 MR. PHILLIPS: Your Honor, good afternoon.  
20 Larry Phillips from the Siebman Burg Phillips & Smith  
21 law firm today, and I have with us from the Morgan  
22 Lewis firm -- I've got Deborah Davidson here and Samuel  
23 Shaul -- Shaulson here with me, and they're going to be  
24 speaking today on our behalf.

25 THE COURT: All right. Thank you very much,

1 Mr. Phillips.

2 MR. PHILLIPS: Thank you.

3 THE COURT: I want to take up the motion to  
4 compel arbitration first, and I -- and I guess I would  
5 like to hear from the movant -- whoever wants to speak  
6 for UBS at this point. Mr. Shaulson.

7 MR. SHAULSON: Yes, good afternoon. Is this  
8 good for the microphone?

9 THE COURT: Yes, that would be great.  
10 And let -- let me -- I've got some questions that I'd  
11 like you to focus your argument, and I'll give the  
12 Plaintiffs a chance to respond to, but I -- I have  
13 spent some time going through the briefs on this. And  
14 the way I see it, some of the argument -- at least a lot  
15 of the argument from the Defendants has been about  
16 whether or not the FAA overrides NASD, FINRA, that sort  
17 of thing.

18 I -- the way I understand the Plaintiff's  
19 argument is that the -- the PartnerPlus or UBS pension  
20 plan, I don't know, what -- what is your preferred way  
21 to refer to that document?

22 MR. SHAULSON: It's the PartnerPlus Plan.

23 THE COURT: I'll call it the PartnerPlus  
24 Plan, then.

25 They contend the PartnerPlus Plan

1 arbitration clause adopts the arbitration rules of NASD  
2 and FINRA, depending on the time period involved. And,  
3 therefore, the intent of the FAA, which is that  
4 arbitration clauses be interpreted or applied according  
5 to their terms, is fulfilled by incorporating the  
6 provisions of NASD and FINRA which don't allow for  
7 arbitration of class claims.

8 I did not see a response from your side  
9 directly to that. What -- what do you say to that?

10 MR. SHAULSON: Sure, Your Honor. First of  
11 all, as I understand the Plaintiffs' argument, they're  
12 trying to say that only the PartnerPlus arbitration  
13 provision is applicable. That incorporates FINRA or  
14 NASD rules, and FINRA rules, therefore, allow or don't  
15 prohibit a class action.

16 Let me explain why UBS believes that to be a  
17 baseless argument.

18 THE COURT: Okay.

19 MR. SHAULSON: First of all, the PartnerPlus  
20 arbitration provision is expressly subject to exhaustion  
21 of the claims procedure set forth in the PartnerPlus  
22 Plan. Therefore, it basically says, subject to  
23 exhaustion of Section 10.1, or whatever the applicable  
24 provision is that has a claims procedure.

25 Now, the Plaintiffs argue that they're not

1 bringing a claim for benefits under the terms of  
2 PartnerPlus. They're bringing a statutory claim under  
3 ERISA.

4 Now, if they're bringing a statutory claim  
5 under ERISA, they argue, we don't have to exhaust our  
6 administrative remedies. But this is not a statutory  
7 issue. This is not a question of whether ERISA requires  
8 exhaustion. The contract, according to its terms,  
9 requires exhaustion before you even get to arbitration  
10 under the PartnerPlus Plan. That's number one. So the  
11 PartnerPlus arbitration provision is not applicable here  
12 at all.

13 Number two, the partnership plan arbitration  
14 provision also is not applicable here, doesn't even come  
15 into play because that arbitration provision is  
16 specifically limited to claims that arise out of the  
17 PartnerPlus Plan. Now --

18 THE COURT: Right. Just so I'll understand,  
19 what you're -- you're not disputing, then, that the  
20 PartnerPlus arbitration clause does not provide for  
21 arbitration of class claims?

22 MR. SHAULSON: The PartnerPlus --  
23 absolutely. The PartnerPlus Plan does not specifically  
24 preclude an individual from bringing a class claim, and  
25 it references FINRA, which I'm going to get to in just



1 30 seconds, but I want to cover this point about why  
2 the PartnerPlus arbitration provision doesn't apply at  
3 all.

4 THE COURT: Well, I understand we're going  
5 to get to that.

6 MR. SHAULSON: Yeah.

7 THE COURT: But first I want to make sure  
8 that you are in agreement with the Plaintiffs that UBS  
9 cannot compel arbitration of class claims under the  
10 PartnerPlus arbitration clause.

11 MR. SHAULSON: I think it can because it  
12 incorporates the FINRA rules, and the FINRA rules  
13 specifically allow other agreements to co-exist with  
14 the FINRA rules and another agreement. And there are  
15 other arbitration agreements which Plaintiffs signed  
16 which they agreed to arbitrate only on a non-class  
17 basis.

18 THE COURT: Well, then, you'd be compelling  
19 arbitration under those arbitration clauses.

20 MR. SHAULSON: Reading both arbitration  
21 provisions in harmony, correct.

22 THE COURT: So absent some other agreement  
23 that provides for arbitration of class claims, UBS does  
24 not try to get there under the PartnerPlus arbitration  
25 clause?

1                   MR. SHAULSON: I think that's generally  
2 true, Your Honor. I think that's true.

3                   THE COURT: Okay.

4                   MR. SHAULSON: We're not -- we are -- we are  
5 telling the Court that you should compel arbitration  
6 under other arbitration agreements, not the PartnerPlus  
7 arbitration agreement.

8                   THE COURT: Direct me to the other  
9 arbitration agreement that you're relying on.

10                  MR. SHAULSON: Okay. So, for example, the  
11 last arbitration agreement that was -- went into effect  
12 for each individual Plaintiff contained an express  
13 class action waiver. So, for example, Mr. Eddington  
14 and Mr. Hendricks are bound by the 2008 compensation  
15 plan.

16                  THE COURT: And which exhibit to your motion  
17 is that?

18                  MR. SHAULSON: So if you look at the  
19 Ferreira declaration, Paragraphs 15 and 21, and Exhibits  
20 13, 21, and 22.

21                  THE COURT: Do you have the exhibit?

22                  MR. SHAULSON: Do you want me to use the  
23 ELMO, Your Honor, or --

24                  THE COURT: I -- I have your motion, so if  
25 you can tell me what exhibit it is, I can find it, I

1 think.

2 MR. SHAULSON: So the Eddington motion,  
3 Exhibit 7, is the Financial Advisor Compensation Plan.

4 THE COURT: That -- that one, just by  
5 coincidence, only prints out the headings of the  
6 paragraphs when you print the copy that was filed. I  
7 think it may have something to do with the colors, so  
8 you can go ahead and use the ELMO.

9 I -- the other exhibits around it, the one  
10 before it, the 2007 and the one after it, the 2009, did  
11 print out, but would -- would it hurt your argument to  
12 go with the exhibits, the one for 2007, Exhibit 6, or  
13 the one for 2009? Is there something different about  
14 2008?

15 MR. SHAULSON: We can go with 2009.

16 Which one is the 2009 one?

17 THE COURT: Okay.

18 MR. SHAULSON: Exhibit 8, Your Honor.

19 THE COURT: Yes, I've got that.

20 MR. SHAULSON: So Exhibit 8, Page 19, is the  
21 arbitration provision.

22 THE COURT: Now, is -- is this document,  
23 this Exhibit 8, an actual plan document, or is this a  
24 summary?

25 MR. SHAULSON: No. What this is, Your

1 Honor, and I think counsel is trying to be consistent  
2 with the local rule of not providing you with pages  
3 upon pages on pages that's not relevant. This is part  
4 of an overall Financial Advisor Compensation Plan,  
5 which I'm happy to hand up and you can see the entire  
6 plan.

7           The Financial Advisor Compensation Plan is  
8 a -- you know, a document which basically sets forth the  
9 terms and conditions of compensation for the financial  
10 advisor. On one page, as you can see, that we've --  
11 actually two pages, it summaries the PartnerPlus Plan,  
12 but it's a self-contained Financial Advisor Compensation  
13 Plan which is acknowledged by the financial advisor, and  
14 then there's a separate arbitration provision that goes  
15 with the financial advisor plan, and that's what you see  
16 on Page 19.

17           THE COURT: Well, what I see on Page 19 is  
18 not part of the summary that starts on Page 14, then?

19           MR. SHAULSON: Correct. Those are just  
20 pages from the Financial Advisor Compensation Plan.

21           THE COURT: Well, then I --

22           MR. SHAULSON: Should I hand this up to you  
23 and -- and you can see what the full document is?

24           THE COURT: I think I do need to see the  
25 full document. Have you -- does the Plaintiff has --

1 have that, as well?

2 MR. STRIS: Yes, Your Honor.

3 THE COURT: Okay. Now, Mr. Shaulson, this  
4 arbitration clause on Page 19, which I guess is also  
5 included in the Exhibit 8, also says it will be  
6 conducted under the rules of FINRA; is that right?

7 MR. SHAULSON: Correct, Your Honor. And  
8 FINRA rules -- specifically FINRA Rule 13204 expressly  
9 permits the use of other arbitration agreements, and the  
10 Courts have universally held that other agreements can  
11 override the standard FINRA rules, including  
12 specifically in the context of a class action waiver  
13 where courts have repeatedly held, including the exact  
14 plan we're looking at, the Financial Advisor  
15 Compensation Plan at UBS.

16 The LaVoice Court, the Cohen Court, the  
17 Lewis Court all have concluded that the incorporation  
18 of FINRA rules does not mean that you can bring your  
19 claims on a class action basis. Where you have a  
20 separate agreement that confines claims that are  
21 subject to arbitration to individual non-class claims,  
22 the individual agreement trumps the standard FINRA  
23 rules.

24 THE COURT: Now, it was difficult to tell  
25 from Lewis and LaVoice that they were dealing with this

1 same plan, or at least they -- they didn't reference the  
2 PartnerPlus Plan that I could tell, but...

3 MR. SHAULSON: That's correct, Your Honor,  
4 they were not dealing with the PartnerPlus Plan. They  
5 were dealing with the Financial Advisor Compensation  
6 Plan, and they enforced arbitration pursuant to that  
7 plan. But, Your Honor, it was exactly the same  
8 argument, whether it was PartnerPlus or the U4, the  
9 standard uniform application for securities dealers, it  
10 was the same argument that the -- that the FINRA rules  
11 were incorporated therein, and, therefore, you couldn't  
12 have class claims.

13 THE COURT: Well, the difference was that  
14 the PartnerPlus Plan doesn't waive class action, that I  
15 could tell.

16 MR. SHAULSON: But just because it's  
17 incorporating FINRA rules, but that's true of the U4, as  
18 well.

19 THE COURT: I mean, it does not have an  
20 express class action waiver in it like what you're  
21 citing to me now, this Financial Advisor Compensation  
22 Plan does.

23 MR. SHAULSON: Prior to 2011, that's true,  
24 Your Honor.

25 THE COURT: And your contention is that 2011

1 is not at issue here?

2 MR. SHAULSON: The 2011 plan is at issue  
3 for two of the named Plaintiffs, Mr. Ellspermann and  
4 Mr. Roccisano. They both signed both the 2011  
5 PartnerPlus Plan and the 2011 compensation plans. But  
6 for the other individuals who worked prior to 2011,  
7 the arbitration agreement found in the latest  
8 agreement applicable to them had a class action waiver  
9 in it.

10 THE COURT: So your contention with respect  
11 to the pre-2011 agreements is that the class action  
12 waiver in this Financial Advisor Compensation Plan also  
13 waives class actions under the PartnerPlus --

14 MR. SHAULSON: Absolutely, Your Honor.

15 THE COURT: -- Plan?

16 MR. SHAULSON: And -- and before you even  
17 get to this issue, we have to analyze what is arbitrable  
18 under the PartnerPlus arbitration provision. I  
19 mentioned, as a contractual matter, Plaintiffs never  
20 exhausted the remedies under the plan, and, therefore,  
21 the PartnerPlus arbitration provision never becomes  
22 applicable at all.

23 Secondly, the arbitration provision in  
24 PartnerPlus specifically only covers claims that arise  
25 out of the PartnerPlus Plan. Plaintiffs in this case

1 are taking the position that their claims don't arise  
2 out of the PartnerPlus Plan. And the reason they're  
3 making that argument is they're arguing that under  
4 ERISA, they don't have a statutory obligation to  
5 exhaust their administrative remedies under the plan,  
6 so they're saying our claims don't arise out of the  
7 plan.

8                   And I'll refer the Court to the IDEA  
9 Corporation case, 545 F.Supp. 2d 600, from the Western  
10 District of Texas, where the Court looked at what is the  
11 scope of an arbitration agreement, a broad versus a  
12 narrow arbitration agreement?

13                   And what the Court said is that arising out  
14 of a contract, when the -- when the parties use the  
15 word, quote, arising out of a contract, end quote,  
16 that's to be given a narrow construction to claims that  
17 arise solely under the contract.

18                   In contrast to the Financial Advisor  
19 Compensation Plan and the Branch Manager Compensation  
20 Plan, for example, where there's an express class  
21 waiver, those contracts cover any disputes between the  
22 parties at all, whether they're employment disputes,  
23 compensation disputes, benefit disputes, and  
24 specifically disputes arising under the very statute  
25 Plaintiffs are trying to bring their claim, ERISA.



1                   So the IDEA Court case said that we are  
2                   going to compel arbitration under the broader  
3                   arbitration provision contained in another agreement,  
4                   not under the narrow arbitration agreement that said  
5                   disputes arising out of the plan.

6                   THE COURT: All right.

7                   MR. SHAULSON: And I also refer the Court to  
8                   Brandl versus ACE USA, 2011 Westlaw 12 --

9                   THE COURT: Let me just interrupt you.

10                  MR. SHAULSON: Sure.

11                  THE COURT: I -- I can only hold so many  
12                  thoughts in my head at once, and what I'd like to do is  
13                  to hear from the Plaintiffs on the -- these first couple  
14                  of points that we've addressed so I can figure out  
15                  where -- where the dispute really is. But I promise, I  
16                  will hear more from you. Thank you, Mr. Shaulson.

17                  MR. SHAULSON: Okay. Thank you, Your Honor.

18                  THE COURT: And let me see, you are?

19                  MR. STRIS: Mr. Stris -- Peter Stris.

20                  THE COURT: Stris. All right. Thank you.

21                  I -- I know you've been introduced once, I'm just -- I  
22                  need to remember better.

23                  MR. STRIS: I understand.

24                  THE COURT: Mr. Stris, a couple of things.  
25                  First off, in the briefs, Plaintiffs spent a while

1 talking about how what we had on the FA -- the Financial  
2 Advisor Compensation Plan was just a summary plan  
3 document which looked like a good argument when all I  
4 had was those pages. But in view of the larger  
5 agreement, the more complete copy of that that's been  
6 made available to me now, it does not look like that  
7 arbitration clause at the end of that and the -- which  
8 includes the class action waiver, was part of the  
9 summary part of the document but rather part of the --  
10 the plan itself.

11 What -- what do you say to that?

12 MR. STRIS: Yeah, let -- let me address that  
13 directly because I think that's a critical issue that I  
14 can clear up.

15 THE COURT: Okay.

16 MR. STRIS: And I think here's how I'd like  
17 to go about it. If you take the document that was just  
18 handed to you that is now in total 25 pages, and on the  
19 cover it -- it says, Financial Advisor Compensation  
20 Plan, so that we're looking at the same thing --

21 THE COURT: Yes.

22 MR. STRIS: -- this is what we refer to in  
23 our papers repeatedly as a summary brochure.

24 Let me walk through how it works so that  
25 we're all on the same page. If you look at the table of

1 contents on Page -- it's before Page 1, there's 10  
2 sections. The first one is called Production Payout.  
3 Do you see that, Your Honor?

4 THE COURT: Yes.

5 MR. STRIS: Some of these sections are  
6 stand-alone. In other words, we mentioned this in a  
7 footnote in -- in our papers. This document describes  
8 different ways our clients could get money. The only  
9 section of this document, however, that's relevant to  
10 this case at all is Section 5. It begins on Page 14,  
11 and in the table of contents, it's labeled UBS  
12 PartnerPlus/UBS Financial Advisor Deferred Award Plan.  
13 Do -- do you see that?

14 THE COURT: Yes.

15 MR. STRIS: Okay. So if you turn to that,  
16 that section, it couldn't be clearer that this section  
17 is a summary. And I would -- I would refer you to Page  
18 15 --

19 THE COURT: I -- I would agree that this  
20 section is a summary of the PartnerPlus Plan.

21 MR. STRIS: Okay. And -- and let me explain  
22 why that matters. On Page 15 -- and I'm going to quote  
23 what it says here. It says, if there is any difference,  
24 any difference, between this summary and the plan  
25 document, the plan document will govern.

1           Now, here's why this matters for purposes of  
2 arbitration. The PartnerPlus Plan document has an  
3 arbitration provision in it. And I'd like to, if you'd  
4 indulge me in a minute, tell you why we unquestionably  
5 win under that provision. Because this document here  
6 says, if there's any conflict, the plan governs, what  
7 that means as a simple matter of contract law is that  
8 the only arbitration language that this Court can look  
9 at is the arbitration language in the PartnerPlus Plan.

10 THE COURT: Now, that -- that's assuming  
11 that the claims are all made under the PartnerPlus Plan  
12 and also I think assuming that -- that this other  
13 arbitration clause doesn't apply to it.

14 MR. STRIS: Yes. And so could -- could I  
15 speak to that for a moment?

16 THE COURT: Well, first off, just so we're  
17 clear, the -- when it says, in the event of a conflict  
18 between the summary of the plans set forth in this  
19 document, that's referring to the two-page summary of  
20 the PartnerPlus Plan, which is 14 and 15, and maybe --  
21 maybe a summary of some other plan that could be  
22 elsewhere. But it's not saying if there's any conflict  
23 between what's on Page 19, which is the arbitration  
24 clause of the Financial Advisor Compensation Plan.

25 MR. STRIS: Well, I -- I wouldn't read it

1     that way, and I could tell you that if this is governed  
2     by ERISA, taking into account the recent Supreme Court  
3     Amara decision and a history of law that spans virtually  
4     every circuit on the difference between a plan document  
5     and summaries, there's no way that any page in this  
6     document could trump the plan.

7                     Now, I -- I submit it's a closer question --

8                     THE COURT: Well, this document is a  
9     separate plan, isn't it?

10                    MR. STRIS: Oh, certainly not.

11                    THE COURT: This -- the Financial Advisor  
12     Compensation Plan, you're saying is not --

13                    MR. STRIS: It -- it would not meet any of  
14     ERISA's requirements, nor -- let me be clear. UBS is  
15     not taking the position that this is an ERISA plan. In  
16     fact, they claim that neither of the documents are an  
17     ERISA plan. Under ERISA, in order for something to  
18     constitute a plan document, there's a list of rigorous  
19     requirements that need to be met, and they clearly are  
20     not met here.

21                    THE COURT: I guess I'm not trying to make a  
22     finding that this is a plan document under ERISA, but  
23     this is -- this is the Financial Advisor Compensation  
24     Plan.

25                    MR. STRIS: That's what --

1 THE COURT: This is not a summary of it?

2 This is the plan itself?

3 MR. STRIS: Well, let me take a step back  
4 and sort of at least explain to you what our argument  
5 is.

6 THE COURT: Okay.

7 MR. STRIS: Our argument is that the  
8 PartnerPlus Plan is an ERISA plan.

9 THE COURT: Okay.

10 MR. STRIS: And I think as a procedural  
11 matter, that needs to be accepted as true because either  
12 what you're faced with is a motion to dismiss, in which  
13 case you have to accept our allegations as pled, and we  
14 plead that it's an ERISA plan, or this comes to you as a  
15 summary judgment motion, in which case, as we say in our  
16 brief, the law is pretty clear, whether something  
17 constitutes an ERISA plan is based on the totality of  
18 the facts and circumstances.

19 THE COURT: I -- I don't have a problem with  
20 at this point assuming that the PartnerPlus Plan is an  
21 ERISA plan --

22 MR. STRIS: Okay. So can I tell you what --

23 THE COURT: -- for purposes of this motion.  
24 Yes.

25 MR. STRIS: So I just want to tell you what

1 flows from that so that you sort of see what our  
2 position is.

3 THE COURT: Okay.

4 MR. STRIS: If we -- if we all accept that  
5 for purposes of this motion the PartnerPlus Plan is an  
6 ERISA plan, then we're stuck with the law of ERISA. And  
7 the law of ERISA says that any peripheral document, it  
8 doesn't matter if you label it a plan, a contract, an  
9 omnibus document, you could put whatever label you want  
10 on it, if it's not the formal plan document, it can't  
11 trump the plan.

12 So if -- if we accept, for purposes of this  
13 motion, that the PartnerPlus Plan is governed by  
14 ERISA -- and that's why UBS throughout their papers  
15 tries to resist that characterization because they  
16 understand what flows from that -- none of this is  
17 relevant. And we don't need to parse the language of  
18 whether the conflict or the difference has to be only  
19 Pages 14 and 15 or if it also includes the final page on  
20 arbitration.

21 THE COURT: It -- all right. You're saying  
22 that your position is that if -- or because the  
23 PartnerPlus Plan is governed by ERISA, no separate  
24 arbitration agreement or class action waiver can cover  
25 it.

1                   MR. STRIS: Unless it complies with 29  
2   U.S.C. 1024, which sets -- and it's a piece of ERISA. I  
3   apologize, I know this is boring. But it's a piece of  
4   ERISA that explains the rigorous requirements that need  
5   to be met if you want to modify a term of the plan  
6   itself.

7                   THE COURT: So -- and are you relying solely  
8   on the PartnerPlus Plan for your claims in this case?

9                   MR. STRIS: No. But -- and I'm happy to  
10  move on to why I didn't think we win even under this  
11  document, if that's what you'd like, but I -- I -- I  
12  don't want to move on unless we're on the same page  
13  about what our argument is under the PartnerPlus Plan.

14                  THE COURT: Okay. Well, I think I  
15  understand your argument is that -- you were saying  
16  unless it complies with section, what, now of ERISA?

17                  MR. STRIS: 29 U.S.C. 1024 says that any  
18  time you want to modify -- make a material modification  
19  to a plan document --

20                  THE COURT: Section 524 of ERISA, is that  
21  the --

22                  MR. STRIS: Oh, I actually don't know what  
23  the -- I know the U.S. Code cite.

24                  THE COURT: Okay.

25                  MR. STRIS: I don't know which sub provision



1 it is at ERISA.

2 THE COURT: All right.

3 MR. STRIS: And -- and that's critically  
4 important because -- and you started your questioning of  
5 my colleagues on this point. We're -- we're taking the  
6 position that the arbitration provision in PartnerPlus  
7 adopts the FINRA rules. We're not arguing that FINRA  
8 trumps anything.

9 THE COURT: No, I understand that.

10 MR. STRIS: Okay.

11 THE COURT: The -- do you have authority  
12 that you can cite, just something specific, that no  
13 arbitration clause or waiver in a separate document can  
14 govern a claim under an ERISA plan?

15 MR. STRIS: I would point you to the section  
16 of our opposition, and I believe it's -- it's argument  
17 Section 3(b). It cites the statute, 29 U.S.C. 1024,  
18 and it also cites the enabling regulations. And if you  
19 look at those regulations and the statute, I'm not sure  
20 I've ever seen a case where someone attempted to do  
21 what you're describing, but I think the regulations and  
22 the -- and the statute will speak for themselves.

23 THE COURT: Well, unfortunately, they don't  
24 talk to me. So have you got access to them now?

25 MR. STRIS: Yeah, I can grab them.

1 THE COURT: Okay.

2 MR. STRIS: Okay. Let me -- I'm sorry.

3 Your Honor, let me -- let me point you -- you're --  
4 point you in two directions. The first, before I get to  
5 the statute, is we cite the -- the seminal Amara case  
6 from the Supreme Court. This is on Page 17 of our  
7 motion. It's a 2011 Supreme Court ERISA case, 131 S.  
8 Ct. 1866. And so you really don't need to even go any  
9 further than that Supreme Court case. It says, summary  
10 documents, important as -- as they are, do not  
11 themselves constitute the terms of the plan.

12 THE COURT: Right. That -- that's not  
13 controversial. I understand that.

14 MR. STRIS: Okay. And we cite a series of  
15 cases from throughout the country after that that  
16 explain that it's not just a summary plan description,  
17 any peripheral document, if it has terms that are less  
18 favorable than the plan, they can't be enforced.

19 THE COURT: These are almost all talking  
20 about documents generated by the company, as opposed to  
21 an agreement signed by the employee and that --

22 MR. STRIS: Well, I don't know -- I would  
23 say that the agreement that was signed by the employee  
24 here was generated by the company, and I'm not sure --  
25 and I'm not sure that that distinction, for purposes of

1 ERISA, would matter. But if you don't accept that, let  
2 me point you to the statutory warrants.

3 THE COURT: I just am looking for a case,  
4 and if you don't have one, there's no shame in saying,  
5 I don't have one, but I'm -- if -- if you do, it would  
6 be helpful, and that is a case that says that an  
7 agreement outside of the ERISA plan can't -- cannot bind  
8 the employee regarding arbitration or -- or class action  
9 waiver.

10 MR. STRIS: I don't, because I've never seen  
11 anyone attempt to do this --

12 THE COURT: Okay.

13 MR. STRIS: -- frankly. And maybe that's a  
14 good segue into two of the things that I wanted to talk  
15 about, most importantly these other cases, you know,  
16 what I like to talk about the UBS success stories, the  
17 LaVoice case and the Lewis case. They really provide  
18 perfect evidence of -- of why our position is right.

19 Let's take LaVoice for a minute. LaVo --  
20 first of all, none of these cases involve the  
21 PartnerPlus Plan, which is not a big surprise because  
22 none of them involved pension claims.

23 So let's take LaVoice. It didn't involve  
24 the PartnerPlus Plan, so the relevant arbitration  
25 provision that we keep talking about wasn't present.

1                   Number two, it didn't involve a class  
2                   action, so the relevant exception to arbitration in the  
3                   plan document wasn't at issue.

4                   And number three, it didn't involve an  
5                   asserted claim for injunctive relief.

6                   So I guess one of the reasons perhaps I'm  
7                   struggling to find a case to point to you to say, hey,  
8                   UBS can't do what it's trying to do here is because I  
9                   haven't seen attempts to do this. I haven't seen  
10                  attempts to circumvent a clear arbitration provision in  
11                  a pension plan in a pension case by looking at some sort  
12                  of peripheral document.

13                  And for -- for good reason we cited the --  
14                  the Nielsen case, this is the 1995 Seventh Circuit  
15                  case. The -- the language is almost identical to a  
16                  word, Your Honor. To a word, the contractual language  
17                  is the same.

18                  And what typically happens in these cases --  
19                  and I have a feeling that it didn't happen here because  
20                  we're talking about a very large class action of  
21                  potentially over a hundred million dollars. You don't  
22                  typically see an attempt to use the wrong arbitration  
23                  provision.

24                  And -- and let me be clear, the arbitration  
25                  provision in the pension plan would require everything

1 but a class action to go to arbitration.

2 THE COURT: Well, now, you -- you've said  
3 you're not making just claims under the pension plan; is  
4 that right?

5 MR. STRIS: I -- I want to be careful about  
6 how I put this. All of our claims arise out of the  
7 pension plan. They may not be -- they may not be for  
8 benefits under the plan, but this new argument that I  
9 heard from my colleague, you know, a few minutes ago was  
10 actually very surprising to me. He says, well, under  
11 the provision in the PartnerPlus Plan, you only  
12 arbitrate claims arising out of the plan. And he cited  
13 a few cases that admittedly are -- are new. I'm not  
14 familiar with them. But he says, they stand for the  
15 proposition that it has to be a claim that is solely  
16 under the contract.

17 That's precisely what our claims are. We  
18 wouldn't have claims but for the existence of the  
19 contract. Our whole point is that we're not being --  
20 UBS is attempting to enforce provisions in the  
21 PartnerPlus Plan that are illegal.

22 So there's a difference between us seeking  
23 benefits under the plan, which we admittedly are not  
24 doing, and us seeking a remedy that's totally apart from  
25 the plan. Every one of our claims arises out of the

1 plan.

2 THE COURT: The only claims you're asserting  
3 deal with your right to pension benefits?

4 MR. STRIS: That's correct.

5 THE COURT: Okay. Now -- so your -- your  
6 answer to the effort to apply the broader arbitration  
7 clause in the Financial Advisor Compensation Plan is  
8 that since it does not meet the requirements of ERISA,  
9 it cannot modify the pension plan arbitration clause?

10 MR. STRIS: That's correct. And I'm happy  
11 to defend our position, even if the Financial Advisor  
12 Compensation Plan arbitration provision were the  
13 governing one. I don't think it is. But, frankly, I  
14 don't think that it would change the outcome in this  
15 case because there's an explicit carve-out for  
16 injunctive claims.

17 And we know -- this is Page 13 of our  
18 opposition. We explained at length how the -- the very  
19 essence of our complaint in this case is one seeking  
20 injunctive relief. Section 5 -- Section 29 U.S.C.  
21 1132(a)(3) allows you to seek an injunction whenever  
22 there's something that -- in a plan that violates the  
23 statute.

24 THE COURT: Yeah, but how can you say the  
25 very essence of your case is seeking injunctive relief

1     when damages is -- is what your clients are after, is it  
2     not?

3                     MR. STRIS: Well, I -- I wouldn't agree with  
4     that characterization because there's --

5                     THE COURT: Do you want damages?

6                     MR. STRIS: We want -- we want money, but  
7     damages, the Supreme Court has made very clear, under  
8     ERISA is -- is a different species.

9                     I -- I think where -- I'd point you to the  
10    Johnson case -- this was recently litigated in the -- in  
11    the Seventh Circuit -- where this exact same issue came  
12    up. And, in fact, the same counsel that represents UBS  
13    here today made this argument in that case. And Judge  
14    Posner rejected it as silly. He basically said, just  
15    because the consequence of the injunction is money  
16    doesn't mean that you're not seeking injunctive relief.

17                    UBS responds in a footnote by saying they  
18    respectfully disagree with that decision, but that  
19    decision used years of -- of U.S. Supreme Court  
20    precedent under the meaning of equitable relief in that  
21    statutory provision. It's weird. I -- look, I admit  
22    the -- the way the Supreme Court has interpreted --  
23    interpreted that provision is strange, but that's what  
24    we're stuck with.

25                    THE COURT: Well, Judge Posner is not your

1 best resource in this Court, but I --

2 MR. STRIS: Well, I -- as a Plaintiff's  
3 lawyer, I very rarely find myself agreeing with Judge  
4 Posner, but when he comes down not only on the side of  
5 Plaintiffs but forcefully so, I think it says something  
6 sort of about the -- the strength of -- of the argument  
7 that's coming from the -- the pension Defendant.

8 And what he essentially did was reject the  
9 notion that this kind of claim, even though it's --  
10 ultimately it hopes to resolve itself by an award of  
11 money, he rejected the notion that that's not one for --  
12 for injunctive relief under the statute.

13 That's the whole point of the CIGNA case.  
14 You can -- you can seek an injunction, you can seek  
15 reformation. These are all equitable remedies, but,  
16 yeah, they end up getting you money, that's true.

17 THE COURT: And the -- but in any event,  
18 getting back to your argument about this carve-out,  
19 you're -- you're suggesting that the -- that opening  
20 clause covers everything else in the paragraph?

21 MR. STRIS: That's our position. I mean,  
22 I -- I -- and I would say I think it's pretty clear  
23 because as I understand UBS's argument, and maybe I  
24 don't, but as I understand it, they seem to be focusing  
25 on the fact that because the -- the provision



1 specifically references ERISA, oh, well, it can't apply  
2 to ERISA claims.

3 But if that's true, it would negate  
4 everything. The -- the way the provision reads, it  
5 says, with the exception of claims for injunctive  
6 relief, everything else is arbitrable. And it lists all  
7 these different statutes.

8 So the -- the fact that it's listing  
9 specific statutes, all that means is that if it's not a  
10 claim for injunctive relief, you have to arbitrate  
11 causes of action under those statutes.

12 THE COURT: It actually says, with the  
13 exception of claims for injunctive relief for the  
14 denial of benefits under the firm's disability or  
15 medical plan.

16 MR. STRIS: It depends on -- it depends on  
17 the version we're looking at. Some versions say that,  
18 that's true. But I don't think that really affects our  
19 argument.

20 THE COURT: Well, it depends on where you  
21 take a breath, but I -- I do have a hard time saying  
22 that that sentence that starts midway down the second  
23 column, by agreeing to the terms of this compensation  
24 plan, that that somehow is falling under the -- with the  
25 exception of claims for injunctive relief.

1                   MR. STRIS: That's an interest -- that's an  
2     interesting point. I have -- if you would permit me, I  
3     have -- I have some thoughts on that.

4                   THE COURT: Okay.

5                   MR. STRIS: I -- I think for -- for perhaps  
6     a counterintuitive reason, it has to include that,  
7     and -- and let me tell you why.

8                   THE COURT: All right.

9                   MR. STRIS: There's -- this -- this  
10    provision, it's no accident that it's all under one  
11    heading called Arbitration. And the reason why is if  
12    you put a class action waiver in a contract that is not  
13    linked to arbitration -- let's say you just decide you  
14    want to have a contract that says, you waive your right  
15    to a class action, the FAA doesn't apply, and if -- and  
16    if that were the case here, I would like new briefing.

17                   I'd get up and I'd argue under -- I don't  
18    care if it's Texas law, New Jersey, New York, I'd argue  
19    it's unconscionable. I'd have all these defenses to the  
20    class action waiver.

21                   UBS doesn't want me to make those arguments.  
22    They want to -- they want to cloak themselves in the  
23    protection of the Federal Arbitration Act, and I don't  
24    blame them. And the way they did that is by linking the  
25    class action waiver to the arbitration provision. They

1 can't have it both ways. Once they link the two and get  
2 us into the world of the FAA, which is what they want, I  
3 get to argue -- and I think with no real persuasive  
4 response -- that this carve-out for injunctive relief  
5 applies to everything. And the class action waiver is  
6 only a waiver to the arbitrable claims.

7 Now, if you end up disagreeing, I would -- I  
8 would ask permission for us to brief the -- the  
9 permissibility of the class action waiver, but this is  
10 never -- this isn't the posture with which it's come to  
11 this Court.

12 THE COURT: All right. Well, let -- what  
13 I'd like to do is to hear the response from the defense  
14 to what you've said about all of your claims rising  
15 under the PartnerPlus Plan and its arbitration clause.

16 MR. SHAULSON: Thank you, Your Honor.

17 THE COURT: Mr. Shaulson, if -- first off,  
18 just with the argument that all the claims arise under  
19 the PartnerPlus pension plan, what can you point me to  
20 that shows that that's not the case?

21 MR. SHAULSON: Sure. Just look at the  
22 Hendricks opposition, Note 13.

23 THE COURT: Let's see, can we work from the  
24 Eddingston? That just happens to be the one that I --  
25 they appear to me to be largely the same, so I've

1 concentrated on one book. Since that was the older  
2 case, I picked it. But -- so if it's the same note,  
3 then that's great.

4 MR. SHAULSON: Can you give me just one  
5 minute, Your Honor?

6 THE COURT: Sure.

7 MR. SHAULSON: So, Your Honor, on Page -- on  
8 Page 16, Note 14 --

9 THE COURT: All right.

10 MR. SHAULSON: So, basically, what they're  
11 saying here is that UBS Pension Plan -- really the  
12 PartnerPlus Plan, but -- only requires administrative  
13 exhaustion when an individual is seeking benefits under  
14 the plan. And then they specifically say they're not  
15 seeking benefits under the plan, they're seeking at the  
16 end of the note to invalidate an illegal plan term need  
17 not first present their case to the party charged with  
18 imposing the illegal term.

19 So notwithstanding what counsel just argued  
20 to try to fit within the PartnerPlus arbitration  
21 provision, they have taken the position in both briefs  
22 that this is not a claim that arises under the  
23 PartnerPlus Plan, it arises --

24 THE COURT: Well, now --

25 MR. SHAULSON: -- under ERISA.

1                   THE COURT: They're not saying that the  
2     claim doesn't arise out of the -- the pension plan.  
3     They're saying they're not seeking benefits, isn't that  
4     what --

5                   MR. SHAULSON: Well, I think the -- well, I  
6     think the import of what they're arguing is that our  
7     claim is a statutory claim and solely a statutory claim  
8     and that it doesn't arise out of the plan. In fact,  
9     they want to amend the plan. They want to reform the  
10    plan.

11                  THE COURT: Where do they say that it  
12    doesn't arise out of the plan? Because there's a  
13    difference between that and --

14                  MR. SHAULSON: Well, it may -- if it arose  
15    out of the plan, then they would have to exhaust their  
16    administrative remedies.

17                  THE COURT: Well, they're -- they're saying  
18    that it's only if it's a claim for benefits that they  
19    have to exhaust remedies.

20                  MR. SHAULSON: Correct. But I --

21                  THE COURT: And are they making a claim for  
22    benefits, in your opinion?

23                  MR. SHAULSON: I think they are seeking --  
24    they want money under the plan. They want the benefits  
25    under the plan.

1                   And here -- here's the thing, Your Honor.  
2     It doesn't matter which way -- which way they go here.  
3     Either they're seeking benefits under the plan, in which  
4     case they had an obligation -- contractual obligation to  
5     exhaust, and they can't invoke the PartnerPlus  
6     arbitration provision because they didn't exhaust. And  
7     it says, subject to exhaustion under Section 10.2, and  
8     then it proceeds to arbitration. If they want to bring  
9     a claim for benefits under the plan, they had to  
10    exhaust. If they don't want to bring a claim for  
11    benefits under the plan and they're taking the position  
12    that this doesn't arise out of the plan -- let -- let  
13    me -- let me address your question this way because I --  
14    I understand your point.

15                  It doesn't even matter what they're arguing.  
16    What matters is the case law. And the case law that I  
17    cited to you before, the Western District of Texas case,  
18    talked about what does language mean when it says, arise  
19    out of a contract? When it arises out of a contract,  
20    it's limited to claims --

21                  THE COURT: You know, I --

22                  MR. SHAULSON: -- for benefits under the  
23    contract.

24                  THE COURT: Have you got something better  
25    than a district court case on that? That's -- I mean,

1 if we're talking black letter law, there should be  
2 some -- something from on high, but in any event --

3 MR. SHAULSON: Well, that -- that case, Your  
4 Honor, I could pull it, but that case does survey other  
5 cases making the same point.

6 THE COURT: That --

7 MR. SHAULSON: I can't tell you whether it  
8 looks to a Fifth Circuit case or not, but it does refer  
9 to other cases making exactly the same point.

10 And with respect to counsel's argument that  
11 we've never seen this before, you know, Your Honor  
12 observed that the arbitration clause contained in the FA  
13 compensation plan -- the FA compensation plan is a  
14 separate agreement. It stands alone. And that  
15 arbitration agreement, of course, can be enforced,  
16 notwithstanding the PartnerPlus Plan. And I'll refer  
17 the Court to --

18 THE COURT: Are you saying it can be  
19 enforced against claims arising under the -- the ERISA  
20 plan?

21 MR. SHAULSON: Absolutely. And, in fact,  
22 the Supreme Court has -- I'm sorry, the Third Circuit,  
23 the Second Circuit have enforced arbitration agreements  
24 in a collective bargaining agreement trumping an ERISA  
25 plan or -- or an SPD, United States versus DuPont.

1                   THE COURT: This is not a collective  
2 bargaining agreement. That --

3                   MR. SHAULSON: But it's -- it doesn't  
4 matter. These are contractual principles.

5                   THE COURT: I -- I just know collective  
6 bargaining agreements have their own great set of -- of  
7 statutory law surrounding them.

8                   MR. SHAULSON: Well, Your Honor, so does the  
9 FAA, but counsel told you that nothing can trump an  
10 ERISA plan. That's what he told you. Nothing can trump  
11 an ERISA plan, and the claims procedure in the ERISA  
12 plan has to prevail.

13                   We know that not to be true because of the  
14 cases DuPont, 388 Federal Appendix 209, Third Circuit,  
15 and United States Steel versus DuPont, 565 F.3d.

16                   THE COURT: And those are both --

17                   MR. SHAULSON: '99.

18                   THE COURT: -- collective bargaining  
19 agreement cases?

20                   MR. SHAULSON: Correct. I'll give you  
21 another case, Your Honor, which is not a collective  
22 bargaining agreement.

23                   THE COURT: Okay.

24                   MR. SHAULSON: And that is Brandl,  
25 B-r-a-n-d-l, versus Ace USA, 2011 Westlaw 129422,



1 Eastern District of Pennsylvania case that compelled  
2 arbitration of ERISA claims under a broad, quote,  
3 employment dispute resolution policy, end quote, not the  
4 ERISA plan document that had no arbitration contract in  
5 it.

6 The reality is, Your Honor, ERISA claims are  
7 compelled to arbitration all the time under employment  
8 policy handbooks, employment agreements. It doesn't  
9 need to be in an actual plan document.

10 What -- what counsel is arguing is a  
11 standard provision that no one is debating, that in  
12 terms of modifying a pension plan under ERISA, you can't  
13 modify it through a summary plan description. Counsel  
14 has not provided to you, because he can't provide to  
15 you, case law which says that an arbitration provision  
16 in a separate non-ERISA document can't have a valid  
17 arbitration agreement over claims for benefits or claims  
18 for benefits under an ERISA plan or ERISA statutory  
19 claims --

20 THE COURT: Okay.

21 MR. SHAULSON: -- because it's just not  
22 true.

23 Now, counsel argues that you should just  
24 accept the fact that this is an ERISA-governed plan.  
25 UBS wholly disagrees with that. The issue of whether

1 this is an ERISA plan is a dispute between the parties  
2 that is subject to arbitration. And under the Federal  
3 Arbitration Act, it's for the arbitrator to decide  
4 whether this is an ERISA plan, not for the Court to  
5 decide.

6 THE COURT: And you cite what case for that  
7 proposition?

8 MR. SHAULSON: My colleague is just grabbing  
9 that.

10 THE COURT: Okay.

11 MR. SHAULSON: So just one case, Your Honor,  
12 you can refer to BP -- it's a Fifth Circuit decision,  
13 2012.

14 THE COURT: I like that.

15 MR. SHAULSON: Makes it easy. BP Explo --  
16 sorry, BP Exploration Libya Limited versus ExxonMobil  
17 Libya Limited. The cite is 689 F.3d 481, 5th Circuit  
18 2012. And it says, in no way are Courts to consider the  
19 merits of a claim. And the merits here is a disputed  
20 issue about whether this is an ERISA-governed plan or  
21 not.

22 Another point that Plaintiffs made in  
23 argument is that the LaVoice decision -- LaVoice versus  
24 UBS -- did not involve a class action claim. That's  
25 just not true. If Your Honor takes a look at that

1 decision, it will be clear that the Plaintiffs were  
2 seeking to bring a class action on behalf of a class of  
3 financial advisors seeking overtime pay. And the Court  
4 said, as it did in Cohen versus UBS, also a class  
5 action, that the FINRA rules -- under well-settled law,  
6 circuit law and district court case law, that FINRA  
7 rules can be overridden by a separate agreement per the  
8 terms of the FINRA rules themselves.

9           Now, Plaintiffs' counsel keeps referring to  
10 in their briefs and at argument this Nielsen case. The  
11 Nielsen case is totally different. It didn't involve a  
12 separate agreement with a class action waiver. It was a  
13 standard formulation of a U4 agreement incorporating --  
14 I don't know if it was FINRA or NASD rules, but the  
15 securities -- security exchange rules. That case has no  
16 application here whatsoever because there was no  
17 separate agreement to agree to arbitrate claims on a  
18 non-class basis.

19           THE COURT: And what -- going back to your  
20 separate agreement, that's the -- the Financial Advisor  
21 Compensation Plan, and --

22           MR. SHAULSON: So it's different for  
23 different people because you have branch managers and  
24 financial advisors, but it's basically the same  
25 provision.

1                   THE COURT: And you're saying that this  
2 document, the 25-page document that you've handed up, or  
3 one very much like it, would be signed by each employee,  
4 or at least each of the financial advisors who would be  
5 Plaintiffs in this case?

6                   MR. SHAULSON: Correct. Each Plaintiff  
7 signed at least one arbitration provision with a class  
8 action waiver. Roccisano signed it five times. Bollich  
9 Cox, and Ellsper -- Ellspermann signed three times.  
10 Eddingston and Galanis signed two times. Davis and  
11 Hendricks signed one time.

12                   And the last agreement -- the last agreement  
13 that went into effect for each one of the individuals  
14 also contained a class action waiver. And I'll tell you  
15 which agreements those are. For Eddingston and -- and  
16 Hendricks, it's the 2008 Compensation Plan. Davis and  
17 Galanis, the 2009 Compensation Plan. Bollich, the  
18 January 2nd, 2009, FA Account Reassignment Agreement.  
19 Cox, the 2010 Compensation Plan. Ellspermann and  
20 Roccisano, the 2011 Compensation Plan, as well as the  
21 2011 PartnerPlus Plan.

22                   So I just wanted to ask my colleague, Your  
23 Honor -- I'll certainly ask -- answer any other  
24 questions you have. I wanted to ask my colleague to  
25 address the questions about the injunctive relief

1 argument that Plaintiffs have made.

2 THE COURT: All right.

3 MS. DAVIDSON: Good afternoon, Your Honor.

4 Deborah Davidson, also on behalf of UBS.

5 THE COURT: All right.

6 MS. DAVIDSON: So the starting point in  
7 looking at this question of the injunctive relief  
8 carve-out is the very basic premise that any doubts  
9 concerning the scope of arbitrable issues should be  
10 resolved in favor of arbitration. And that's under both  
11 Supreme Court and Fifth Circuit case law.

12 And as you point -- and as Your Honor  
13 pointed out when Mr. Stris was referring to the  
14 injunctive relief carve-out that appeared in the 2007 FA  
15 Compensation Agreement, there's actually different  
16 language that appears in the various versions of the  
17 comp plans.

18 And so, for example, between 2008 and 2010,  
19 the comp agreements provided for -- with the exception  
20 of claims for injunctive relief or the denial of  
21 benefits under the firm's disability or medical plans.  
22 Similar language appeared in the account reassignment  
23 agreements for 2009. Other agreements frame the  
24 carve-out as injunctive relief under this letter of  
25 understanding. That's for the LOUs signed by Plaintiff

1 Roccisano and Plaintiff Hendricks. And then still  
2 others frame the carve-out as injunctive relief under  
3 this agreement, and that is the Account Reassignment  
4 Agreement signed by Mr. Bollich.

5               So it's clear that there are different ways  
6 that the Court could look at what exactly is meant by  
7 this carve-out for injunctive relief. One  
8 interpretation would be that -- that this carve-out  
9 applies only to claims either under this agreement with  
10 respect to the account reassignment and the LOU  
11 agreements, or for the 2008 going forward comp plans  
12 that it would only be with respect to claims involving  
13 medical or disability benefits.

14               THE COURT: Can you articulate any reason  
15 why it would have been limited to medical or disability  
16 benefits? I mean, is there some reason why that would  
17 be a reasonable interpretation of the agreement?

18               MS. DAVIDSON: Well, simply in -- in -- in  
19 looking at how it -- how it's phrased.

20               THE COURT: Well, I -- I see the words. I'm  
21 just wondering if -- if there's something about the  
22 medical and disability plans that would make it more  
23 logical to carve out a claim for injunctive relief.

24               MS. DAVIDSON: Yeah, well -- well -- and,  
25 Your Honor, I can't -- I can't answer that off the top

1 of my head without going back and -- and actually  
2 reviewing the terms of the medical and disability  
3 benefit plans that were in effect over time.

4 But even setting that aside, going back  
5 again to this all doubts in favor of arbitration kind of  
6 starting point, the carve-out for injunctive relief,  
7 how -- you know, whichever of these phrasings you  
8 choose, it's only a carve-out for claims for injunctive  
9 relief.

10 But the arbitration agreement is actually  
11 much broader than that. It applies to any and all  
12 disputes relating to employment, compensation, benefits,  
13 whether statutory or otherwise, including under ERISA.  
14 And as -- and as my -- my colleague, Mr. Shaulson,  
15 explained, this is clearly a dispute involving benefits  
16 compensation under the statute of ERISA, which is a  
17 question for the arbitrator to decide.

18 What -- before you even get to the point of  
19 what type of relief might ultimately be available if the  
20 Plaintiffs were to prevail, there has to be a number of  
21 findings made as to whether the plan was, in fact,  
22 covered by ERISA, if it was, did it violate ERISA's  
23 vesting and forfeiture provisions. And then at the end  
24 of the day, finally, there would be a determination as  
25 to what the appropriate remedy would be.

1                   And you have to take a step back and -- and  
2   look at the -- look at the language in context. You  
3   know, especially considering the -- the any and all  
4   language here -- excuse me. You know, this is the type  
5   of language that other Courts have found does not  
6   override an otherwise very broad agreement to arbitrate  
7   any and all claims like we have here, and I can give you  
8   a few examples.

9                   So, for example, in a Fifth Circuit  
10   decision, Personal Security & Safety Systems versus  
11   Motorola, it's 297 F.3d 388. In that case, there was a  
12   broad arbitration provision that covered an entire  
13   contractual arrangement, but then there was also  
14   language that gave -- that gave Texas courts exclusive  
15   jurisdiction over any suit or proceeding. And so the  
16   Court had to look at whether that exclusive jurisdiction  
17   language trumped the arbitration agreement, and it found  
18   that it didn't. It said, standing alone, one could  
19   plausibly read the forum selection clause to mean that  
20   Texas courts had the exclusive power to resolve all  
21   disputes arising under the stock purchase agreement.  
22   But the forum selection clause does not stand alone.  
23   And the Court went on to go ahead and -- and find that  
24   the claims were arbitrable.

25                   And there is similar reasoning in the Comedy



1 Club case that we cited in the briefing. In that case,  
2 the arbitration agreement said that all disputes had to  
3 be resolved by arbitration, but then there was also a  
4 carve-out for equitable remedies, again, that would be  
5 subject to the exclusive jurisdiction of Courts. And  
6 the Courts said, well, the exclusive jurisdiction for  
7 this equitable relief carve-out can't trump this  
8 otherwise very broad arbitration agreement because  
9 the Court has to resolve all doubts in favor of  
10 arbitration.

11 THE COURT: And is this the same case that  
12 you're talking about that you started on, or is this a  
13 different case that says that? The -- the one you're  
14 saying --

15 MS. DAVIDSON: Oh, this is the -- the Comedy  
16 Club case is cited in our -- yeah, it's a different case  
17 than the Fifth Circuit case.

18 THE COURT: All right. And -- and what's  
19 the cite on it?

20 MS. DAVIDSON: It's 553 F.3d. 1277, and  
21 that's a Ninth Circuit decision.

22 THE COURT: Too bad.

23 MS. DAVIDSON: That's why we cited the Fifth  
24 Circuit case first, that's true.

25 You know, but also, Your Honor, if -- if

1     you -- if you go with Plaintiffs' interpretation and --  
2     and find that simply dropping the word "injunction" in a  
3     complaint is enough to take an -- an otherwise  
4     arbitrable claim completely out of the scope of the  
5     arbitration agreement, then the exception ends up  
6     swallowing the rule. And it would mean that anybody  
7     who's filing suit would simply say, I want an  
8     injunction. I want an injunction to get a promotion. I  
9     want an injunction not to be discriminated against. I  
10    want an injunction to keep my job during a reduction in  
11    force. I want an injunction against offering certain  
12    types of investments in my 401(k) plan. I mean, you --  
13    you get my drift.

14                 Here, it's become very clear that what the  
15    Plaintiffs are seeking to recover is the money. It's  
16    all about the money. And the fact that they say that  
17    they want an injunction -- first of all, as -- as I  
18    mentioned earlier, you don't even get there because the  
19    issues as to whether they can even establish that the  
20    plan was governed by ERISA and that there was any ERISA  
21    violation and that they would even be in a position to  
22    seek any kind of relief, those are all questions for the  
23    arbitrator.

24                 But what they've also made clear is that  
25    what they -- they -- what they want to happen is for the

1 plan document to be reformed so that they could be in a  
2 position to get more money. That's not an injunction,  
3 Your Honor. An injunction is something that is forward  
4 looking to prevent against future harm. These are  
5 individuals who have all left UBS. They've taken  
6 complete distributions of their benefits under  
7 PartnerPlus. So the only way that they can be made  
8 whole is to get a check for money. That's not an  
9 injunction.

10 THE COURT: All right. Ms. Davidson -- or  
11 Mr. Shaulson, let me hear from -- from Plaintiffs'  
12 counsel briefly, a response on that before we move on to  
13 anything else.

14 Mr. Stris, why shouldn't the scope of that  
15 arbitration clause and whether or not the -- the first  
16 clause relating to injunctive relief affects the rest of  
17 the clause, why shouldn't that be referred to an  
18 arbitrator if the Court finds that this clause is the  
19 effective clause?

20 MR. STRIS: Well, I -- I guess the best way  
21 I would answer that is that's just another way of asking  
22 the question who gets to decide if ERISA applies? And I  
23 think the starting point is -- and we addressed this at  
24 Page 4 to 5 of our opposition in Footnote 3. We're  
25 either dealing with a motion to dismiss here or we're

1 dealing with something that has a summary judgment  
2 standard. So let me -- let me walk through the  
3 procedures.

4 If what we're dealing with is a motion to  
5 dismiss, we cite the Monarch Flight case and the Taylor  
6 case for the fact that you -- you accept our allegation  
7 that this is an ERISA plan.

8 THE COURT: Well, we're not really dealing  
9 with a motion to dismiss or a motion for summary  
10 judgment. We're dealing with a motion to compel  
11 arbitration.

12 MR. STRIS: But there has to be a procedural  
13 standard by which we determine who has the burden of  
14 proof, who gets to decide what.

15 So let me go directly to the issue of who  
16 gets to decide, the Court or the arbitrator. My  
17 colleagues cite you to this Fifth Circuit case, the --  
18 the Libya case. Well, I would point more directly to  
19 another case they cite. It's a 1986 Supreme Court  
20 case, the AT&T case. It's on Page 16 of 29 of their  
21 papers.

22 THE COURT: Uh-huh.

23 MR. STRIS: It makes very clear that a  
24 question such as is this an ERISA-governed plan, that  
25 needs to be decided by the Court. That's not -- that's

1 not an issue of the merits, and you really need to look  
2 no further than the seminal Granite Rock case, another  
3 Supreme Court case, 2010, we cite it on Page 14 of our  
4 agreement. And, basically, what the Court held there is  
5 that --

6 THE COURT: I'm not really on whether or not  
7 this is an ERISA-governed plan because this arbitration  
8 clause that we're talking about now that's in the  
9 Financial Advisor Compensation Plan, nobody contends is  
10 in an ERISA plan, right?

11 MR. STRIS: That's right.

12 THE COURT: It's just a question of does it  
13 govern the claims that you're asserting here.

14 MR. STRIS: Well, we -- I would submit that  
15 we only get there if you've rejected our earlier  
16 argument that under ERISA, we have to look at the -- the  
17 language in the PartnerPlus Plan.

18 THE COURT: Well, you've not been able to  
19 cite me any case that -- that addresses whether a  
20 general arbitration agreement by an employee can affect  
21 that. I understand because you don't believe it's ever  
22 been tried before.

23 MR. STRIS: I was hoping to speak to that  
24 issue because I think it's going to be critical in  
25 resolving this -- the -- this issue.

1                   THE COURT: Are you familiar with this  
2 Brandl case?

3                   MR. STRIS: I -- I am sufficiently familiar  
4 with the cases cited and the argument made by my  
5 colleagues that I -- I think I have a very direct  
6 response which is this.

7                   THE COURT: Okay.

8                   MR. STRIS: The question is, when do  
9 separate agreements trump an ERISA plan? That's the  
10 question. And I want to be very clear here. My  
11 argument is not that you can have -- you can't have a  
12 separate agreement to arbitrate. That is not my -- my  
13 position.

14                   My position is that this is a unique case  
15 where the pension plan has an arbitration provision. If  
16 you accept my argument that that provision governs, then  
17 you're in black letter ERISA law. And under black  
18 letter ERISA law -- this comes right out of the statute,  
19 29 U.S.C. 1024 -- you cannot materially modify any  
20 provision in the ERISA plan. It doesn't matter if it's  
21 arbitration, if it's the way you calculate your benefit,  
22 unless you comply with specific rules.

23                   So every case that UBS has cited to you is  
24 irrelevant. In fact, they -- they told you the one case  
25 that they -- they most heavily relied on, there was no

1 arbitration provision in the pension plan. That's not  
2 this case. See, I feel like it's partially my fault.  
3 We're getting away from sort of what the core -- in my  
4 view, what the core issue is here.

5           We have a pension case. We have a dispute  
6 about a pension plan. The pension plan has an  
7 arbitration provision that UBS can't get up here and  
8 credibly argue applies to this case because it carves  
9 out class actions. So we've spent a lot of time today  
10 talking about other issues, but really at the end of the  
11 day, we only get to those issues if for some reason  
12 we're not interpreting the arbitration provision in the  
13 pension plan in a pension case.

14           And I don't think any argument about how,  
15 well, there's a -- there's a -- you need to err on the  
16 side of -- of favoring arbitration --

17           THE COURT: I think the concise answer to my  
18 question would be you say the Brandl case is  
19 distinguishable because the pension plan in that case  
20 did not have an arbitration agreement.

21           MR. STRIS: Yes, I --

22           THE COURT: Okay.

23           MR. STRIS: I -- and I would -- I would go a  
24 step further. I'll try and be concise. I believe UBS  
25 has not cited a single case where there is a pension

1 plan that had an arbitration provision that permitted  
2 the case to proceed in court that was then trumped by an  
3 outside agreement.

4 And that's critical because my argument only  
5 kicks in when you're trying to use an external document  
6 to change the pension plan.

7 THE COURT: Okay.

8 MR. STRIS: And that's why I can't give you  
9 a case because I wasn't trying to be -- be -- you know,  
10 slick. I've never seen a situation, and I've never -- I  
11 read a lot of cases. I've never read a case where  
12 someone has tried to use another document to get around  
13 the pension plan.

14 That's the point I was trying to make about  
15 LaVoice and Cohen and Lewis in -- not -- UBS has not  
16 responded to the fact that in none of those cases was  
17 the -- was the PartnerPlus Plan involved. In none of  
18 those cases was the arbitration provision that we rely  
19 on put before the Court. In none of those cases did the  
20 Plaintiff argue, hey, we get to proceed with our class  
21 action because there's a provision here that exempts  
22 class actions.

23 And there's a simple reason for that. There  
24 was no provision that exempted class actions in those  
25 cases because they weren't pension cases.



1                   THE COURT: Okay. Well, then let me hear  
2     from them on that. Thank you. You've helped focus my  
3     understanding of your argument.

4                   MR. SHAULSON: Your Honor, first of all,  
5     these are two separate agreements, as we've gone over,  
6     and you can have an agreement to arbitrate ERISA and  
7     pension plan claims outside of an ERISA plan.

8                   THE COURT: Well, but the question is, can  
9     it modify the arbitration provision within the ERISA  
10    plan?

11                  MR. SHAULSON: Right. Now, let me -- let me  
12    answer that. The -- according to the Courts,  
13    arbitration agreements need to be read harmoniously  
14    with one another. Let me just get you a -- let me just  
15    get -- I'm going to --

16                  THE COURT: I think that's true of all  
17    agreements, but --

18                  MR. SHAULSON: Right. So now you have a  
19    PartnerPlus Plan, and let -- I'll indulge counsel for a  
20    second in saying, assume it's an ERISA plan, which,  
21    again, I think is an issue for the arbitrator to decide.  
22    It goes to the merits. The issue about summary  
23    judgment, motion to dismiss, those are disputed issues  
24    of fact. This is a question of -- of law, a dispute of  
25    law. The arbitrator is to decide disputed issues of law

1 when the parties have agreed to arbitrate.

2 In any event, the arbitration agreement  
3 contained in the PartnerPlus Plan, there's no dispute  
4 that it incorporates FINRA rules. The FINRA rules  
5 specifically allow a separate agreement. So there is no  
6 conflict between the -- what they'll say is an  
7 ERISA-governed plan, the PartnerPlus, and the FA  
8 Compensation Plan, because the PartnerPlus Plan  
9 specifically incorporates a rule that says can have a  
10 separate agreement. And the PartnerPlus Plan doesn't  
11 say you can bring a class action. It absolutely doesn't  
12 say that. All it says is we're going to incorporate  
13 FINRA rules.

14 Now, what do FINRA rules say? FINRA rules  
15 say, ordinarily -- ordinarily, we're not going to hear  
16 class claims, and, ordinarily, you may have a right to  
17 go to Court to bring a class claim, but you can have a  
18 separate agreement in which you agree not to have class  
19 claims.

20 THE COURT: Now, we're not here on the  
21 question of whether or not their class claim should be  
22 dismissed.

23 MR. SHAULSON: Correct.

24 THE COURT: And that -- that's a matter that  
25 you could bring up by whatever means you want. We're

1 just here on the matter of should their claims be  
2 compelled to arbitration and on -- so the -- the meaning  
3 of that arbitration clause which incorporates FINRA is  
4 what I'm looking at.

5 MR. SHAULSON: Right.

6 THE COURT: And that arbitration clause, if  
7 it incorporates FINRA, doesn't extend to class claims,  
8 right?

9 MR. SHAULSON: No, it says -- specifically  
10 with respect to class claims, Rule 13204. It has a  
11 savings provision, and the savings provision  
12 specifically says that you can have a separate  
13 arbitration agreement.

14 THE COURT: Throw -- throw that 13204 up on  
15 the ELMO --

16 MR. SHAULSON: Sure.

17 THE COURT: -- and let's -- let's look at  
18 that.

19 MR. SHAULSON: Sure, Your Honor.

20 So just -- just -- am I doing this wrong  
21 here? There we go.

22 So, basically, in A, it says, class claims  
23 may not be arbitrated under the code. And then it  
24 said -- you know, talks about what a class claim is.  
25 But the key provision is on the next page. You tell me

1     when you want me --

2                   THE COURT:   Go ahead.

3                   MR. SHAULSON:  -- to flip it.  So this is  
4     your savings clause at the end -- sorry, I did it again.  
5     I underlined it.  These par -- these subparagraphs,  
6     being the subparagraphs of 13204, do not otherwise  
7     affect the enforceability of any rights under the code  
8     or any other agreement.

9                   Now, there's also another provision here,  
10    and I'll -- I'm just going to go back to -- it says in  
11    4, 13204(a)(4), and it talks about how you can't enforce  
12    an arbitration agreement until -- and then on the next  
13    page it says, the last bullet -- the member of the  
14    certified or putative class elects not to participate in  
15    the class.

16                   So we're not writing on a blank slate here,  
17    Your Honor.  We've had multiple Courts opine on this  
18    very issue, including three with respect to UBS's FA  
19    Comp Plan.  And in each case, the Court has said that  
20    what this clause means is that you can have a separate  
21    agreement in addition to the FINRA rules, and that that  
22    agreement is enforceable.

23                   And so the Cohen, the LaVoice Courts, the  
24    Lewis Court have all concluded that notwithstanding an  
25    agreement to incorporate FINRA rules, it is entirely

1 consistent with that other agreement and consistent with  
2 the FINRA rules to have an arbitration agreement which  
3 has a class action waiver in it.

4 And so even if you accept Plaintiffs'  
5 counsel's argument, there is no conflict between the  
6 SPD, which doesn't expressly preclude class actions, and  
7 the FA Compensation Plan.

8 THE COURT: Well, what about Nielsen and the  
9 Citigroup case?

10 MR. SHAULSON: Sure, Your Honor. First of  
11 all, Citigroup is a case about waiver. It's a case in  
12 which the Defendant, I believe, didn't move to compel  
13 arbitration until 18 months after the litigation began,  
14 after class certification had already been granted, and  
15 the Court simply considered whether Citigroup had waived  
16 the right to compel arbitration and concluded that it  
17 had.

18 The Nielsen case is a case in which they  
19 incorporate the security industry rules, and there's no  
20 separate agreement to waive class action claims. That  
21 is completely unlike Lewis, Cohen, LaVoice, the Suschil  
22 case from the Northern District of Ohio. It's  
23 completely unlike the Second Circuit's decision in  
24 Merrill Lynch versus Georgiadis, Credit Suisse versus  
25 Pitofsky, the Chanchani case from the Southern District

1 of New York. Every case that has ever considered this  
2 issue has said that when you consider an incorporation  
3 of FINRA rules in one agreement, if you have another  
4 agreement that says you're going to have a class action  
5 waiver or otherwise modify FINRA rules, it's entirely  
6 enforceable, because that's what the rules say.

7 THE COURT: Well, the -- it's hard for me to  
8 go with your analysis of that Citigroup case. While  
9 admittedly the case is about waiver, it goes on to say  
10 that under the NASD rules, claims submitted for -- as a  
11 class action shall not be eligible for arbitration, nor  
12 may a member enforce agreement, neither Lomas himself or  
13 those class members subject to NASD rules could be  
14 compelled to arbitrate.

15 MR. SHAULSON: Right. But that -- again,  
16 there's no separate agreement to arbitrate on a  
17 non-class basis.

18 THE COURT: Well --

19 MR. SHAULSON: And by the way, I'm -- I'm  
20 very familiar with that Citigroup Plan. The Citigroup  
21 Plan basically says -- which was not at issue because  
22 they have a different plan that specifically says you  
23 can't bring class action claims. This was before the  
24 amendment of that plan. That is completely  
25 distinguishable for the same reason that Nielsen is

1 distinguishable. There was no separate agreement to  
2 arbitrate on a non-class basis, which is the case here.

3           And if we look at the -- if you looked at  
4 the Cohen decision, you know, the -- the Court goes  
5 through it in painstaking detail. It says, number  
6 one -- and it actually says it this way. Number one,  
7 this Court has to recognize that you can enter into  
8 additional arbitration agreements beyond the scope of  
9 the code, meaning the industry code in the -- in the  
10 FINRA rules. Then it says, number two, the code is not  
11 affected by the enforceability of these additional  
12 contracts. Moreover, the -- it -- it says the financial  
13 advisors elected not to participate in a class action.  
14 Once you elect not to participate in a class action, as  
15 they did here -- as the Plaintiffs did here by agreeing  
16 to arbitrate on a non-class basis, you can go to FINRA  
17 on an individual basis and 13204 is no barred.

18           And by the way, this isn't -- this isn't --  
19 not only is the case law universal, Plaintiffs in the  
20 Hendricks brief -- and I could find you the cite in the  
21 Eddington brief, as well, but on Page 16 of the  
22 Hendricks opposition, Plaintiffs specifically say, you  
23 can do this. In fact, they say, it's not hard for UBS  
24 to do this. All they have to do is draft a provision  
25 with a class action waiver. Well, that's exactly what

1 UBS did.

2 THE COURT: I see what you're  
3 talking about --

4 MR. SHAULSON: Your Honor, just --

5 THE COURT: -- in the ERISA plan, but...

6 MR. SHAULSON: Yeah, but, again -- again,  
7 their -- their argument -- if you accept their argument,  
8 and we do not because, number one, it's not an ERISA  
9 plan. It's a question for the arbitrator as to whether  
10 it is an ERISA plan. Number two, they're making the  
11 argument about modifying an ERISA plan. No one is  
12 arguing -- there is no argument by UBS that we are  
13 modifying an ERISA plan. These are two separate  
14 stand-alone agreements, as Your Honor indicated before,  
15 two separate stand-alone agreements that can stand by  
16 themselves. And there's no prohibition on an individual  
17 agreement to arbitrate -- to arbitrate claims for  
18 benefits or ERISA claims.

19 Number three, Your Honor, even if their  
20 argument were correct -- even if their argument were  
21 correct that ERISA has some rule that would prevent you  
22 from having a separate arbitration agreement, we're not  
23 writing on simply a blank slate of ERISA claims. We  
24 also have the Federal Arbitration Act to contend with  
25 here, too. And the Federal Arbitration Act trumps



1 ERISA. The Federal Arbitration Act says that you have  
2 to enforce the arbitration agreement according to its  
3 terms.

4           Moreover, Your Honor, the Fifth Circuit,  
5 picking up on Supreme Court authority, very well settled  
6 Supreme Court authority, said in the Webb versus  
7 Investacorp case -- and I'll get you the cite for  
8 that -- in Webb versus Investacorp, Inc., 89 F.3d 252,  
9 1996 decision from the Fifth Circuit, said, if it's  
10 been established that there is an arbitration  
11 agreement -- which there clearly has, there's no dispute  
12 that there's an arbitration agreement at play here --  
13 any ambiguities -- any ambiguities on the scope of the  
14 arbitration clause, quote, must be resolved in favor of  
15 arbitration, end quote.

16           And the standard here is that unless it can  
17 be said with positive assurance that the agreements are  
18 not susceptible to an interpretation favoring an  
19 arbitration, then the arbitration agreement needs to be  
20 enforced, favoring arbitration. And it's Plaintiffs'  
21 burden to prove that there's not positive assurance.

22           THE COURT: What is the gist of your  
23 argument that the PartnerPlus agreement is not covered  
24 by ERISA?

25           MS. DAVIDSON: And, again, Your Honor, I say

1     this with the -- the starting point that we believe this  
2     is an issue for the arbitrator to decide, but the  
3     question that the arbitrator will face is -- is this a  
4     pension plan or is it another type of plan that doesn't  
5     fall within the bucket of pension plan under ERISA. So  
6     to be a pension plan under ERISA, it has to be a plan  
7     that is designed to provide retirement income.

8                     A PartnerPlus Plan is not designed to  
9     provide retirement income. It's a deferred compensation  
10    plan to reward financial -- excuse me -- to reward  
11    financial advisors and branch managers in terms of  
12    compensation. It's deferred, but it's not deferred  
13    until retirement.

14                    And, in fact, over time, the plan has  
15    required that participants begin taking distributions of  
16    their benefits while still employed. And that's very  
17    different from a pension plan where the benefits by  
18    their very design do not even kick in until someone is  
19    terminating employment and getting to retirement age.  
20    So that's the gist of it. It's -- it's a bonus plan.  
21    It is not a retirement plan. It's not designed to  
22    provide retirement income.

23                    THE COURT: And has its status, as covered  
24    by ERISA or not, been litigated before other Courts?

25                    MS. DAVIDSON: No.

1                   THE COURT: Has it been subjected to  
2 arbitration?

3                   MS. DAVIDSON: There are other claims  
4 involving PartnerPlus that are pending, but there --  
5 there's been no decision.

6                   (Discussion off the record between Defense  
7 counsel.)

8                   MS. DAVIDSON: Oh, that's true. Well, the  
9 Thaning case, Thaning versus PaineWebber UBS, that also  
10 involved the PartnerPlus Plan, and that's a -- a claim  
11 that was compelled to arbitration.

12                  THE COURT: And was there any decision about  
13 whether or not it was an ERISA plan?

14                  MS. DAVIDSON: Not by the Court, and I --  
15 I'm not aware of what, if any, decisions were made by  
16 the arbitration panel, but that -- that claim did not  
17 challenge the plan as an ERISA plan.

18                  THE COURT: All right. Thank you.

19                  What do you say, Mr. Stris, to the argument  
20 that the execution by your clients of the -- I'll call  
21 it waiver of class action participation, but in any  
22 event, the language in that Financial Advisor  
23 Compensation Plan that we've talked about, what do you  
24 say to the argument that that kicks in this provision of  
25 FINRA that the member has elected not to participate in

1 a class action?

2 MR. STRIS: Yeah. So I think now we're  
3 getting to sort of the heart of -- of where I was trying  
4 to start earlier because I think this issue stops us  
5 from being ships -- us and UBS from being ships passing  
6 in the night. Here's how -- here's how I would conceive  
7 of it.

8 UBS tells you, you can have a separate  
9 agreement that overrides FINRA for these various reasons  
10 you just mentioned. They also tell you, and I don't  
11 disagree, you can have a separate agreement that changes  
12 a pension plan. Neither of those things are relevant  
13 here because the separate agreement has to be valid. It  
14 has to be binding.

15 And so my answer to your question is very  
16 straightforward, and this is why I focus so much on  
17 why this is an ERISA case. Under ERISA, if you start  
18 with a pension plan, like the PartnerPlus Plan, that  
19 says, we are incorporating FINRA's rules. You are  
20 permitted to bring a class in court. And let's be  
21 clear, that's what the Niel -- the Nielsen case and  
22 the -- the First Circuit case say. The language is  
23 almost exactly the same, and the Seventh Circuit said,  
24 it expressly prohibited the Defendants from getting that  
25 class action out of court.

1                   If that's your starting point, and we submit  
2     it is, then it takes a heck of a lot to contract around  
3     that. And if you're dealing with an ERISA plan, and I  
4     still haven't heard a response from my -- from my  
5     colleagues here, that means you're trying to modify the  
6     plan. And I've heard nothing. 29 U.S.C. 1024 says,  
7     when you modify a plan, you must comply with strict  
8     requirements. They haven't even gotten up here and said  
9     they've complied with those requirements. So FINRA  
10    doesn't get you around the ERISA problem.

11                   Now, if you --

12                   THE COURT: All right. Let me -- let me  
13    just -- I don't know that you really addressed this.

14                   MR. STRIS: Okay.

15                   THE COURT: If -- if FINRA says, class  
16    claims can be submitted to arbitration once the member  
17    elects not to participate --

18                   MR. STRIS: I see where you're going.

19                   THE COURT: -- then how does it violate the  
20    PartnerPlus arbitration clause --

21                   MR. STRIS: Yeah.

22                   THE COURT: -- to submit this to  
23    arbitration?

24                   MR. STRIS: Here's why. The -- all of our  
25    clients and all members of the class were parties to the

1 PartnerPlus Plan. And they were told, including in the  
2 summary document, hey, go look at the plan documents.  
3 They're available on the extranet. Check them out.  
4 They govern.

5           If anyone, myself, any of my clients went  
6 and looked at that agreement, they would see language  
7 that says, essentially, you have to arbitrate  
8 everything, except for a class action. And they thought  
9 that that's what governed, just like in the Nielsen  
10 case.

11           So when they executed this separate  
12 document, it was not their intent -- especially when the  
13 document says if there's any conflict, the plan  
14 governs -- to give up those rights.

15           Now, you don't have to take my word for it,  
16 and you don't have to indulge in presumptions because  
17 ERISA provides very specific requirements to protect  
18 against this very thing from happening. It says, if you  
19 want to change what you've told people are their rights  
20 in the pension plan, you need to -- you need to do it in  
21 writing, you need to do it in a way that an average  
22 person can understand --

23           THE COURT: Well, let me -- I'm familiar  
24 with that jurisprudence. But the PartnerPlus Plan  
25 doesn't say anything about class actions in the

1 arbitration clause.

2 MR. STRIS: Well, I --

3 THE COURT: It just incorporates FINRA,  
4 right?

5 MR. STRIS: Yeah, but I don't think I would  
6 agree with that characterization because -- can I look  
7 at -- can I -- can I walk -- walk you through the  
8 language?

9 THE COURT: Sure.

10 MR. STRIS: What it says, and I'm going to  
11 quote, is claims, quote, shall be resolved before an  
12 NASD arbitration panel in accordance with the  
13 arbitration rules of the NASD.

14 Now -- and it was later changed to FINRA.  
15 Now, if we look at the FINRA rules, they say two things.  
16 They say, FINRA won't permit an arbitration of claims  
17 when a class action is pending. And, secondly, and more  
18 importantly, they say, a party isn't able to enforce an  
19 arbitration provision that relates to pending class  
20 claims.

21 THE COURT: And it goes on to say, until,  
22 right?

23 MR. STRIS: That's right.

24 THE COURT: Until the member elects not to  
25 participate.

1                   MR. STRIS: And so now we get to the \$64  
2 million question, which is, did my clients elect not to  
3 participate by -- and I guess UBS's argument would be  
4 signing the -- what I call the summary brochure.

5                   And I think there's a simple answer, which  
6 is under ERISA, that can't count. That's not good  
7 enough. The whole jurisprudence of waiver is under  
8 ERISA, and ERISA is very protective. It says, if you're  
9 going to waive rights that you have in the plan  
10 document, it has to be done in a very specific way.

11                   So I don't care what FINRA says. FINRA can  
12 say, this doesn't eclipse other agreements, but if I  
13 hold a gun to someone's head and say, sign this  
14 agreement, obviously, that's an agreement that's --  
15 that's procured under duress. UBS couldn't come into  
16 Court and say, oh, but FINRA says, this doesn't  
17 affect -- this is eclipsed by other agreements. It has  
18 to be another valid and binding agreement.

19                   So, essentially, their -- they -- their  
20 argument begs the question, it totally fails to respond  
21 to -- to our critical position, which is that agreement  
22 isn't an enforceable agreement. And that's why they  
23 make such a big deal of the fact that this is not an  
24 ERISA case and that the arbitrator has to decide. And  
25 so --



1                   MR. GOODMAN: Your Honor, may I call  
2 Mr. Stris' attention to one thing?

3                   THE COURT: Go ahead.

4                   MR. GOODMAN: Your Honor, with respect to  
5 the specific language that you've referred to, the  
6 member of the certified or putative class elects not to  
7 participate, that clearly relates to an opt-out because  
8 it involves judicial involvement. It says, which elects  
9 not to participate in the class or withdraws from the  
10 class according to conditions set by the Court. It is  
11 not a reference to any separate agreement. By its very  
12 terms, they reference to an opt-out subject to  
13 conditions set by the Court, which is certainly what the  
14 Court has authority to impose under Rule 23 when a class  
15 action goes forward.

16                   And so this claim language simply does not  
17 allow for enforcement of a separate agreement distinct  
18 from the argument that the -- there's a -- a governing  
19 plan that doesn't permit enforcement of any contrary  
20 document. That language does not do it. It's --  
21 it's incorporation, if anything, of Rule 23, opt-out  
22 provisions.

23                   THE COURT: All right. Is -- it -- it was  
24 my understanding that UBS is contending that some Courts  
25 have relied upon that as an answer to the limitation of

1 the arbitration clause to FINRA rules. Is -- is that --  
2 am I understanding that -- your position right,  
3 Mr. Shaulson?

4 MR. SHAULSON: Yes, Your Honor.

5 THE COURT: And which case would that be  
6 that you would point to, or cases?

7 MR. SHAULSON: Sure. So there's several,  
8 Your Honor. There's the U -- there's the LaVoice versus  
9 UBS case.

10 (Discussion off the record.)

11 MR. SHAULSON: There's the LaVoice versus  
12 UBS case. There's the Cohen versus UBS case.

13 THE COURT: And -- and do those specifically  
14 refer to this provision of FINRA adopting a -- a waiver  
15 of class action claims?

16 MR. SHAULSON: The -- the Cohen case, I'm  
17 sure, does. That's the case that I referred to earlier  
18 that went through the one and the two. So the Cohen  
19 case both referred to the savings clause at the end,  
20 doesn't affect the enforceability of rights under the  
21 code or any other agreement, and also referred to the  
22 election. So -- I forget your -- your name, sir.

23 MR. GOODMAN: Goodman.

24 MR. SHAULSON: Goodman.

25 So Mr. Goodman referred to the election

1 provision, but didn't address the savings provision at  
2 the end about a separate agreement. I'll also add that  
3 the Suschil court from the Northern District of Ohio  
4 also specifically addressed that savings provision in  
5 the context of a class action waiver.

6 And I believe Lewis -- Lewis versus UBS also  
7 enforced the class action waiver notwithstanding the U4  
8 rules.

9 Now, with respect to the election language  
10 that Mr. Goodman referred to, it says, the member of the  
11 certified or putative class elects not to participate in  
12 the class, which is different than withdraw from the  
13 class according to conditions set by the Court.

14 So you can make an election. If -- if that  
15 only meant withdrawn according to conditions by the  
16 Court, opting out, then they wouldn't need to say both  
17 of those things. Those are two different things. One  
18 is withdrawing from the class according to conditions by  
19 the Court, i.e., opting out. The first is electing not  
20 to participate.

21 If I tell a Court -- if I tell the Court,  
22 Judge, I'm not participate -- a purported class action  
23 such as this is filed, no certification decision or what  
24 have you, if I'm a class member and I say to the Court,  
25 I'm -- I'm not participating in this. I already signed

1 an agreement electing not to participate. That's an  
2 election not to participate. You don't need conditions  
3 by the Court or what have you. No one can be compelled  
4 to, you know, participate in the class action.

5           The other thing that -- the other thing  
6 that -- that I want to address is we're not just looking  
7 at -- we're not just looking at contractual provisions.  
8 We're looking at contractual provisions against the  
9 backdrop of the Federal Arbitration Act. So we need to  
10 look at the FAA and the embodiment of a policy in favor  
11 of arbitration so that all doubts get resolved in favor  
12 of arbitration.

13           What counsel was arguing is a very circular  
14 argument that you've incorporated FINRA rules. We're  
15 going to ignore FINRA rules. And you can't -- you can't  
16 have the FINRA rules because the SP -- because the  
17 PartnerPlus Plan says something else. I don't get it.  
18 The PartnerPlus arbitration provision says, we're  
19 incorporating FINRA rules.

20           Now, if the financial advisor or branch  
21 manager went to the arbitration provision of the  
22 PartnerPlus Plan, they would see that it says, subject  
23 to exhaustion -- we'll put that aside -- in the event of  
24 any dispute, claim, or controversy involving a  
25 claimant -- and I'll put this on the screen so Your

1 Honor can see it -- I'm sorry, were you -- were you done  
2 looking at that?

3 THE COURT: No, go ahead. That's fine.

4 MR. SHAULSON: Sorry. So it says, in the  
5 event of any dispute, claim, or controversy involving a  
6 claimant and the plan and the sponsor, involving a  
7 claimant, if anybody read that language, they would  
8 presume that that is an individual claim by the claimant  
9 and the plan.

10 Now, if you went -- if the person actually  
11 went to the incorporated FINRA rules, they would see  
12 what we saw before. Number one, there are exceptions to  
13 the rule, when you make an election and other agreements  
14 are enforceable.

15 Now, I'll point out -- this is not a retail  
16 clerk that we're talking about here or, you know,  
17 some -- some person who hasn't -- hasn't, you know,  
18 advised clients about millions and millions of dollars  
19 of investable income. These are people who made  
20 hundreds and hundreds and hundreds, some of them  
21 \$800,000.00 a year, they made from UBS. These are not  
22 unsophisticated individuals.

23 As Marsh versus Prudential pointed out, the  
24 New York Court of Appeal, financial advisors are very  
25 sophisticated individuals. And there's a slew of case

1 law -- I can't cite it to you today, but there's a slew  
2 of case law that contracts, that incorporate by  
3 reference are valid and enforceable and individuals are  
4 presumed to know the agreements that they agreed to.

5 THE COURT: All right. We're going to take  
6 a brief recess now, and we'll be back in 15 minutes,  
7 3:30. Thank you.

8 MR. SHAULSON: Thank you, Your Honor.

9 (Recess.)

10 LAW CLERK: All rise.

11 THE COURT: Good afternoon. Please be  
12 seated.

13 Having carefully considered the briefs and  
14 exhibits filed in this matter and the extensive oral  
15 argument that we've heard today and being mindful of the  
16 policy of the Federal Arbitration Act in favor of  
17 arbitration, that only where the terms of the  
18 arbitration clause call for it, I find that the  
19 arbitration clause in the PartnerPlus Plan clearly does  
20 not extend to arbitration of class claims.

21 I further find that the language of the  
22 FINRA rule, which I believe is 13240, which has language  
23 accepting class claims where the member elects not to  
24 participate, does not apply here. Pre-suit waiver  
25 clause, such as that relied upon in the Financial

1 Advisor Compensation Plan does not fall within the  
2 language of that FINRA rule which contemplates election  
3 not to participate in or withdrawal from a pending  
4 certified or putative class action claim.

5 Therefore, I find that the PartnerPlus  
6 arbitration clause does not provide for arbitration  
7 of the claims that the Plaintiffs are making in this  
8 case.

9 The Court will accept the PartnerPlus Plan  
10 as a covered ERISA plan at this time, based upon the  
11 allegations of the complaint and the first amended  
12 complaint and also based on the fact that it appears,  
13 based on a reading of those plans, to meet the  
14 definition of a pension plan or a deferred compensation  
15 plan that would be covered by ERISA.

16 Whether or not it actually is such a plan is  
17 a matter that will have to be determined at a later  
18 date. But because the Court accepts it as such at this  
19 time, as I believe the Court has to on this record, the  
20 separate arbitration agreement in the Financial Advisor  
21 Compensation Plan will not be allowed to modify the  
22 arbitration clause in the PartnerPlus Plan under ERISA.  
23 And to give it the effect that the Defendant, UBS, is  
24 arguing for in this case would be to modify that plan.

25 Accordingly, the Court will proceed with the

1 case to the stage involving class certification. The  
2 Defendant may at the same time present the motion for  
3 summary judgment, if it believes it can support one, on  
4 the matter of ERISA coverage, which, if successful,  
5 could result in a reconsideration of this ruling.

6 Also, obviously, if the class is not  
7 certified, then the FINRA rules would allow for  
8 compelling arbitration of the individual claims through  
9 the PartnerPlus Plan.

10 I'll -- I will accordingly proceed to the  
11 question of the schedule which has been addressed by  
12 both sides in their Rule 26(f) submissions. At this  
13 point, my intention is simply to schedule the matter  
14 through a class certification hearing. If the class is  
15 certified, then we'll take up the timeline to trial of  
16 the class claims. If it's not certified, then we'll  
17 proceed along a different route.

18 I think it's incumbent upon the Plaintiffs  
19 to file a motion for class certification as soon as  
20 possible, and I -- in the submission, the joint  
21 submission, the suggestion was made that the motion  
22 itself could not be filed until -- let's see, 120 days  
23 from now.

24 Is there any reason why such a lengthy  
25 delay is necessary to file the motion for class



1 certification?

2 MR. GOODMAN: Your Honor, the only reason  
3 could be the necessity for some class discovery, and  
4 what -- what may make sense is for the parties to confer  
5 about a period not longer than that and see if we can  
6 come to a joint recommendation in the next few days to  
7 the Court about a set of deadlines that relates to class  
8 certification and discovery and if there are expert  
9 witnesses for that on class certification and such, in  
10 other words, try to restate the class  
11 certification-related deadlines for the Court's  
12 consideration. That's one approach.

13 I think that we'd probably like to discuss  
14 among ourselves what scope of class discovery is  
15 appropriate, which would, to me, be the only condition  
16 that would bear on whether we could do it sooner than  
17 120 days.

18 THE COURT: What sort of discovery are  
19 you planning on seeking before the certification  
20 hearing?

21 MR. GOODMAN: Your Honor, if the issue of --  
22 for example, of whether it's an ERISA plan and it's  
23 certainly a unitary plan and the contention is that its  
24 provisions are illegal as to hundreds if not thousands  
25 of individuals, if there is a question about ERISA

1 coverage -- that under the applicable law, in fact,  
2 under the statute is very clearly -- has some facts  
3 bearing on it. To the extent there are contentions that  
4 there is any individualized treatment necessary,  
5 notwithstanding this one plan, one set of provisions,  
6 one claim of illegality, then there may be a need to  
7 test that opposition by some limited discovery  
8 depositions of human resource representative, et cetera.  
9 Those are the kinds of questions, I think, that would  
10 bear on the certification issue.

11 THE COURT: Well, that in my mind is all the  
12 more reason to get your motion filed early. That --  
13 what the points of dispute are between the parties as  
14 to Rule 23 won't really be focused until you've filed  
15 your motion and they've filed their response. And if  
16 there are fact issues that need to be resolved to  
17 present those disputes to the Court at the  
18 certification hearing, then -- then at least we'd know  
19 why discovery was needed. But until they see your  
20 motion and you see their response, I don't understand  
21 how you're going to go about determining what's in  
22 dispute.

23 MR. GOODMAN: I -- I appreciate what the  
24 Court has said, and it may be that the motion could be  
25 filed, the opposition could be filed, and the Court can

1 permit discovery prior to the final hearing with  
2 supplemental papers to be filed based on any discovery  
3 document or otherwise that's taken. That's -- that  
4 certainly seems sensible. I agree with the Court that  
5 that will be the best way to -- to flag any issues that  
6 exist.

7           Counsel at this table can confer for a few  
8 minutes and perhaps say more, but I certainly don't have  
9 a problem with the Court's suggestion that some final  
10 hearing would await whatever appropriate identification  
11 of issues in discovery occurred for some period of 30,  
12 60, 90 days, that kind of thing.

13           THE COURT: Well, I -- what I'll do is  
14 I'm -- I'll take another break in a minute and let y'all  
15 confer, but what -- what I think needs to be established  
16 is a date as soon as possible for you to file your  
17 motion, 30 days or so for the Defendants to file their  
18 response, a date for both sides to provide lists of  
19 witnesses and experts who they intend to call at a  
20 hearing, and -- and then a hearing date. And I would  
21 think that it can be done with a minimum of discovery.  
22 I mean, these issues are not supposed to be on the  
23 merits.

24           MR. GOODMAN: Your Honor, you may be -- it  
25 may end up being perfectly true that there are very

1 limited or -- or no issues that are -- that require that  
2 kind of discovery, but we'll confer about that and come  
3 up with something that probably looks very much like  
4 what you just suggested.

5 THE COURT: All right. And --

6 MR. GOODMAN: We'll confer with the other  
7 side, as well.

8 THE COURT: And I understand -- I'll just  
9 note for the record, I understand that Defendant's  
10 participation in this scheduling effort is by no means a  
11 waiver of your rights to object to the ruling on the  
12 motion to compel arbitration.

13 But we'll take a brief recess to allow you  
14 to confer about a schedule. Thank you.

15 MR. GOODMAN: Thank you.

16 LAW CLERK: All rise.

17 (Recess.)

18 LAW CLERK: All rise.

19 THE COURT: Thank you. Please be seated.

20 I understand that counsel have had a chance  
21 to confer about a schedule for the certification hearing  
22 which would involve the filing of the Plaintiffs' motion  
23 for certification within 30 days --

24 MR. GOODMAN: Yes.

25 THE COURT: -- from today? And the

1 Defendant's response after a like period, 60 days from  
2 today; is that right?

3 MS. DAVIDSON: Actually, Your Honor -- well,  
4 first, you know, just as -- as you've explained that  
5 we're not waiving any objections that we may have to  
6 your ruling by participating in -- in this conference,  
7 we do intend to file a written motion to stated  
8 proceedings so that we may object to the ruling, seek an  
9 appeal, if necessary, so that the parties not only get  
10 the benefit of the bargain to arbitrate, but that we're  
11 not impending upon the right of the arbitrators to  
12 decide these disputes.

13 That said, in terms of the scheduling, we --  
14 we would like 60 days following the Plaintiffs' motion  
15 for certification to respond because we'll need to take  
16 the depositions of all eight Plaintiffs who are  
17 scattered all over the country. And as a practical  
18 matter, that's not something that we'll be able to  
19 accomplish within less than 30 days.

20 THE COURT: Well, I -- I don't think there's  
21 any requirement that you depose all of the named  
22 Plaintiffs before a certification hearing.

23 MS. DAVIDSON: Well, Your Honor, we -- we  
24 would like to get their testimony so that we can  
25 determine whether we have a basis to challenge their

1 adequacy as class representatives and whether there may  
2 be issues with respect to the typicality of their claims  
3 compared to the claims of the class members they purport  
4 to -- purport to represent.

5 THE COURT: Yeah, I'm -- I'm familiar with  
6 the process. But in any event, that would -- there's no  
7 reason you can't start scheduling their depositions now,  
8 is there?

9 MS. DAVIDSON: We can start scheduling them,  
10 but we need to see what their motion --

11 THE COURT: Sure.

12 MS. DAVIDSON: -- says.

13 THE COURT: Scheduling them to be done after  
14 their motion is filed within 30 days, so that you can  
15 accomplish the eight depositions, if you want all eight,  
16 within the next 30 days after that?

17 MR. GOODMAN: Your Honor, we obviously think  
18 that -- that the time period for them to -- to respond  
19 is -- is -- should be tied to the date of the filing of  
20 the motion, not to some date from today. If we get it  
21 in in 18 days, they should answer on Day 48.

22 THE COURT: Well, I -- I don't mind giving  
23 them, you know, a longer period. I -- if I thought  
24 there was a serious chance you'd get your motion in  
25 ahead of the deadline, then I'd spend more time on that

1 issue. I just -- I've never seen it happen. I know it  
2 can. I've just never seen it. So not from you, I'm  
3 not -- that's -- that's --

4 MR. GOODMAN: Who knows, we may surprise  
5 you, Your Honor.

6 THE COURT: I look forward to it. I hope  
7 you will.

8 But in any event, my original concern, I  
9 simply -- I understand that the parties want the  
10 opportunity to file sort of updated responses just  
11 before the hearing. I think if you discover anything  
12 about the Plaintiffs that you didn't know at the time  
13 you filed your opposition, then you can include that in  
14 your supplemental brief, but I don't want to delay your  
15 opposition that far out.

16 So, you know, I'll give you 60 days from  
17 today to file your -- your opposition to their motion.  
18 We've -- I think we've cleared a date of June 4. Both  
19 sides are available that day, as I understand it.  
20 Plaintiffs and --

21 MR. GOODMAN: Your Honor, we don't have a  
22 great computer calendar system right now. I think we  
23 can confirm that within a day, certainly in the morning,  
24 but we're going to make time. We're going to make it  
25 happen, so -- it's hard to actually confirm it right

1 now.

2 THE COURT: The adequacy of representation  
3 issue, you know, the ability to know what your calendar  
4 is, is something that you need to be ready to show the  
5 Court.

6 MR. GOODMAN: Your Honor, we had -- we had a  
7 glitch. I understand. Thanks.

8 THE COURT: All right. Well, I'm -- I'm --  
9 that was said in jest.

10 MR. GOODMAN: I understand.

11 THE COURT: And I apologize for that.

12 But UBS is available on the 4th?

13 MS. DAVIDSON: Yes.

14 THE COURT: All right. Then I'll show the  
15 matter as set for June 4 at 9:00 o'clock. If you  
16 discover that you have a serious conflict there, bring  
17 it to my attention tomorrow and we'll try to deal with  
18 it.

19 Did you discuss when you would propose to  
20 exchange witness and exhibit lists before the  
21 certification hearing?

22 MS. DAVIDSON: No.

23 THE COURT: Okay. Frankly, that -- I  
24 think --

25 MR. GOODMAN: I might suggest the middle of



1 May for that, Your Honor. We're going to be doing final  
2 briefing presumably -- discovery before that and final  
3 briefing after that for the hearing.

4 MS. DAVIDSON: How about May 17th?

5 THE COURT: All right. If that's what both  
6 sides want, I'll be happy to --

7 MR. GOODMAN: Monday, Friday?

8 MS. DAVIDSON: It's Friday.

9 MR. GOODMAN: Okay. That's fine.

10 THE COURT: May 17 for witness and exhibit  
11 lists.

12 Do you want to have expert reports exchanged  
13 before that date in the event that you're going to have  
14 experts?

15 MS. DAVIDSON: Your Honor, we -- we'd like  
16 to have 60 days following Plaintiffs' experts' reports  
17 for -- for Defendants to submit its -- an expert report.

18 MR. GOODMAN: That is not going to work  
19 under any --

20 THE COURT: Do you expect to call experts at  
21 the class certification hearing?

22 MR. GOODMAN: Your Honor, I can't -- I can't  
23 say right now. Honestly, I'm not sure we will, but I --  
24 I do need some -- some time to think about that. We can  
25 certainly confer with counsel, but we will endeavor to

1 get any expert report we think we need as early as  
2 possible. But if you give them 60 days to respond,  
3 we're going to be so close to the end of this 120-day  
4 period, that we'd have no time to depose.

5 MS. DAVIDSON: And, Your Honor, we would  
6 request then that if -- if Plaintiffs do intend to  
7 identify an expert that it be done at the same time that  
8 the motion for class certification is filed.

9 THE COURT: Do the Defendants intend to  
10 call expert witnesses whether or not the Plaintiffs do,  
11 but only -- or only in response to experts by the  
12 Plaintiff?

13 MS. DAVIDSON: Well, we haven't made that  
14 determination yet, Your Honor.

15 THE COURT: Well, in that case, I guess  
16 what I'll do is just -- if you don't know the answer to  
17 that, then my inclination would be to have simultaneous  
18 expert reports exchanged.

19 If you're only going to offer them if they  
20 do, then I don't mind having theirs go first, but if --  
21 if -- absent that agreement, then we'll just do it  
22 simultaneously.

23 MS. DAVIDSON: Could you give us a moment to  
24 confer?

25 THE COURT: Yes.

1                   MR. GOODMAN: Your Honor, we -- we -- we  
2 did confer, and it makes sense to us that we would have  
3 some period of time after their response to -- to  
4 finalize the expert reports so the expert could address  
5 any issues raised by Defendant.

6                   15 days is what we were -- what we're  
7 inclined to recommend, 15 days after the response to  
8 designate ours and maybe 30 days after that for their --  
9 them to designate theirs.

10                  THE COURT: All right.

11                  MR. GOODMAN: Certainly no longer.

12                  THE COURT: That may work.

13                  Yes, ma'am?

14                  MS. DAVIDSON: Your Honor, we would propose  
15 that Plaintiffs disclose any experts they -- they plan  
16 to rely on at the same time as their motion for class  
17 certification. We will disclose any expert we plan to  
18 rely on at the same time we file our response, and then  
19 the parties can exchange rebuttal reports within 15 days  
20 after.

21                  THE COURT: So are you -- when you say  
22 disclose, you're talking about just identify or provide  
23 a report?

24                  MS. DAVIDSON: Providing the report.

25                  MR. GOODMAN: Your Honor, we -- we can't --

1 we can't provide a report that addresses issues that  
2 can't be anticipated that they raise.

3 MR. SHAULSON: We didn't ask. We said if  
4 you had rebuttal, if you had -- you -- you asked that  
5 you be given 15 days after our response. We're giving  
6 you the 15 days.

7 MR. GOODMAN: And -- and your -- your -- the  
8 question is --

9 THE COURT: Do y'all want to confer again  
10 or --

11 MR. GOODMAN: Your Honor, it seems to me  
12 the question is whether the rebuttal is -- is only from  
13 the same designated witness or whether if there was some  
14 other witness whose testimony was made relevant by their  
15 opposition that we would be able to designate somebody  
16 else. That's the only procedural problem I see with --  
17 with that that's obvious.

18 THE COURT: Okay. Well, I tell you what,  
19 I'll -- I appreciate your arguments on it, and I'll  
20 issue an order that sets out the expert disclosure  
21 dates, along with the order that confirms the rest of  
22 these dates.

23 MR. GOODMAN: All right. Thank you.

24 THE COURT: All right.

25 MR. GOODMAN: All right. Good. Thank you.

1 MR. SHAULSON: Thank you, Your Honor.

2 LAW CLERK: All rise.

3 (Recess.)

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1 CERTIFICATION

2

3 I HEREBY CERTIFY that the foregoing is a  
4 true and correct transcript from the stenographic notes  
5 of the proceedings in the above-entitled matter to the  
6 best of my ability.

7

8

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SHELLY HOLMES	Date
Deputy Official Reporter	
State of Texas No.: 7804	
Expiration Date: 12/31/14	

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